SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 723

LAKE ERIE CATTLEMEN'S CAMP ASSOCIATION,
Petitioner,

v.

MARGARET DIXIE DAY, *et al.*, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF OHIO

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November 27, 1964.

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No.

LAKE BRADY SPIRITUALIST CAMP ASSOCIATION,
Petitioner,

v.

MARGARET DISS DIX, *et al.*, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF OHIO

The petitioner, Lake Brady Spiritualist Camp Association, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Appellate District of Ohio, a judgment which the Supreme Court of Ohio refused to review. That judgment was rendered in the above-entitled proceeding on November 20, 1963.

OPINION BELOW

No opinions were rendered in the courts below. The final judgment of the Court of Appeals for the Seventh Appellate District of Ohio, consisting of a journal entry, findings of fact and conclusions of law, is reprinted in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Appellate District of Ohio was entered on November 20, 1963. The Supreme Court of Ohio on June 3, 1964, denied a timely motion to certify the record of the case for review and decision, and sua sponte dismissed the appeal "for the reason that no substantial constitutional question exists herein." A timely application for rehearing of that action was denied on July 1, 1964. On September 23, 1964, Mr. Justice Stewart signed an order extending the time for filing this petition for a writ of certiorari to and including November 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether, consistently with the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, a state court may deprive a lessor, without compensation, of his constitutional right to lease his land on reasonable conditions and to enforce in the future all covenants of a valid 99-year real estate lease, except those pertaining to rent and taxes, solely by reason of the lessor having ignored past breaches of certain but not all such covenants.

CONSTITUTIONAL PROVISIONS INVOLVED

Sec. 1, Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner is a 75-year old religious organization dedicated to promoting the claims of modern spiritualism and the mutual interests of members and their families. It is duly incorporated under the laws of Ohio as a non-profit corporation.

Among the various stated objects of the organization is that of owning land for the purpose of holding religious exercises and meetings thereon. In furtherance of this object, the petitioner in 1902 acquired title in fee simple to certain land in Portage County, Ohio. This land, which is the subject of this litigation, was later subdivided into 67 individual lots.[1]

Between the years 1920 to 1957, about 35 of these lots were leased by petitioner on a 99-year basis to various individuals involved in this litigation. Each leasehold grant contained specific restrictions, conditions and covenants relative to the use and enjoyment of the land by the lessee during the term of the lease. Among such covenants were the following:

> (1) An obligation on the lessee to pay specified rent for a year in advance and to pay all taxes and assessments on the premises.
>
> (2) An obligation on the lessee not to use the premises for any purpose inconsistent with the general religious purposes of the lessor or inconsistent with any of the lessor's by-laws.
>
> (3) An obligation on the lessee not to use the premises for any commercial purpose unless spe-

[1] Petitioner over the years constructed a hotel, a church assembly hall, a meeting house and ten individual homes on portions of this land. All of these structures are maintained by voluntary contributions.

cifically authorized by the lessor, not to keep any boarders for hire nor furnish board or lodging for hire without written authorization, and not to use intoxicating beverages on the premises under any circumstances.

(4) An obligation on the lessee not to erect any barn or building for the keeping of animals or fowls, and not to keep animals or fowls, without specific permission by the lessor.

(5) An obligation on the lessee not to throw or discharge garbage or "kitchen slops" upon the premises or adjoining streets, and an obligation to observe the lessor's regulations concerning water closets and privies.

(6) An obligation on the lessee not to sublet any part of the premises without the lessor's written consent.

(7) An obligation on the lessee to erect "a good frame building of the assesssable value of not less than two hundred dollars" within two years of the date of the lease.

(8) An obligation on the lessee whereby "this indenture shall not be sold or transferred and the rights hereby granted, assigned or conveyed, to any person whatever upon any condition, without the written consent of said Board of Trustees."

(9) A right of the lessor "at all reasonable times to enter upon said premises and examine the same as to their sanitary and fire regulations."

Each lease further contained a forfeiture clause, providing that if the rent should remain unpaid or "if

default shall be made in any of the covenants or agreements herein contained" the lessor may thereupon rescind the indenture and declare it null and void. Upon such rescission, the lessor has the right to enter upon the premises and eject the tenants, the lessee agreeing to permit such repossession without hinderance or delay.

Originally, although not as a part of the written lease form, each applicant for a lease—as a condition to acquiring a lease—had been required to become a member of the petitioner organization and to continue in that capacity during the term of the lease. But in some instances over the years this requirement was not strictly enforced.

In 1959 the petitioner filed two actions in forcible entry and detainer in the Municipal Court of Ravenna, Ohio, to regain possession of a lot leased by Andrew Wyatt and another by Howard Fritz. It was alleged that they had breached certain covenants of their respective leases.

Shortly thereafter, however, the respondents filed the instant class action in the Court of Common Pleas, Portage County, Ohio. The complaint, making reference to the pending eviction suits against Wyatt and Fritz, alleged that petitioner was threatening to cancel all the leases and to forfeit rights thereunder "without any substantial cause therefore." Unless restrained, the complaint stated, petitioner would continue to file other eviction suits against lessees. The complaint accordingly requested that petitioner be restrained "from evicting its lease holders or from proceeding with any eviction actions already filed." A

declaration was also sought that the "said leases be declared valid and in full force and effect."[2]

Following a non-jury trial, the Court of Common Pleas enjoined petitioner from proceeding in the two pending eviction suits and further enjoined petitioner from attempting to cancel any or all leases for any reason whatsoever. Petitioner then perfected an appeal to the Court of Appeals for the Seventh Appellate District of Ohio. That court, after hearing the matter de novo, adopted findings of fact submitted by the respondents, findings which in effect found that petitioner had by its course of conduct waived all of the covenants of the leases except the covenant to pay rent and to pay taxes. Included among the covenants found to be waived were those involving the subleasing of premises, the assignment or transfer of leases and the mortgaging of buildings, as well as the maintenance of membership in the petitioner organization. And petitioner was further found to have waived its rights "to inspection, sanitary conditions, and appearances of the houses on the leased premises." See pp. 3a-4a, *infra*.

The Court of Appeals thereupon concluded, as a matter of law, that the petitioner "by its course of conduct during the continuance of the leases and over many years waived all of the covenants of the leases except the covenant to pay rent and to pay taxes." By virtue of such waiver, the court concluded that it would not enforce "the forfeiture provisions of the leases nor the restrictions or restraints against assignments,

[2] A second cause of action was alleged, the claim being that the petitioner was insolvent and guilty of certain ultra vires acts. A dissolution of the corporation and a distribution of assets were sought. But this second cause of action was later withdrawn by the respondents and is no longer in issue.

alienations or hypothecation." Further, the court concluded that "the leases are valid and in full force and effect" and that the lessees "are entitled to peaceable enjoyment of their respective premises under the leases except to the provision for payment of rent and payment of taxes." See pp. 4a-5a, *infra.*

Having found that a waiver had occurred and that the penalty and forfeiture clauses of the leases could not be enforced, the court awarded a permanent injunction against petitioner evicting the lessees or persons holding under the lessees. See pp. 1a-2a, *infra.*

The Supreme Court of Ohio, in the exercise of its discretion, declined to review the action of the Court of Appeals.

RAISING THE FEDERAL QUESTIONS

Only after the Court of Appeals, hearing the case de novo, went beyond the prayer for relief and entered a judgment voiding all the leasehold covenants save those relating to rents and taxes did the federal constitutional issues become evident. Petitioner thereupon applied to that court for a rehearing, asserting that the decision operated to deprive petitioner "of said real property without due process of law as quaranteed by the 14th Amendment of the United States Constitution, and Article I, Section 16 of the Constitution of Ohio." Petitioner further requested that this constitutional question be incorporated in the court's journal entry.

While the Court of Appeals denied rehearing without comment, Presiding Judge Paul W. Brown of that court has signed a certificate, which is part of the record before this Court, that upon the appeal there were presented and necessarily considered and denied

by the Court of Appeals the following federal constitutional questions raised by petitioner:

> "1. That the non-enforcement of the covenants in the covenants in the leases in the future denied their rights under the Equal Protection Clause of the Fourteenth Amendment.
>
> "2. That such non-enforcement confiscated their property contrary to the Due Process Clause of the Fourteenth Amendment.
>
> "3. That such non-enforcement constituted an arbitrary interference with and impairment of existing lease contracts."

The Supreme Court of Ohio, exercising its discretionary powers, declined to review the judgment of the Court of Appeals and dismissed the appeal for lack of a substantial constitutional question, the foregoing Federal constitutional issues having been presented to it.

REASONS FOR GRANTING THE WRIT

The decision below, voiding nearly all the covenants designed to protect a lessor's legitimate concerns in leasing land for 99-year terms, raises significant and novel issues under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. So universal is the practice of inserting protective covenants in such long term leases that the arbitrary destruction of those covenants by the court below must be viewed as an ominous threat to the constitutionally protected rights of all lessors in the United States, a threat that fully warrants the invocation of this Court's review powers.

1. It is axiomatic, of course, that among the essential attributes of real property protected by the Fourteenth

Amendment are "the rights to acquire, enjoy, own and dispose of property" for lawful purposes. *Shelley* v. *Kraemer,* 334 U.S. 1, 10; *Terrace* v. *Thompson,* 263 U.S. 197, 215. The landowner has the constitutional right "to devote its land to any legitimate use" and neither a state legislature nor a state court may "impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 121. Hence petitioner had the constitutional right to impose reasonable and lawful conditions and covenants in leasing its land for 99-year terms.

2. In this case, however, a state court has directly and arbitrarily impinged upon that constitutional right. None of the various covenants in the leases in question has been found unreasonable or unlawful; indeed, the court found the leases to be "valid and in full force and effect." But based solely on a finding that in the past breaches of *certain* of those covenants had been ignored, the court has held that *all* the covenants—save those relating to rent and taxes—must be considered waived and unenforceable for the remainder of the 99-year terms. And it has held that even those covenants which had not been breached in the past must be considered unenforceable in the future. Thus petitioner has been deprived of the right to enforce such hitherto unbreached covenants as those barring commercial activity, barring the keeping of animals or fowl, or barring other activities inconsistent with the religious nature of the petitioner organization.

Such a determination must be viewed as a purely arbitrary one, unrelated to any rational interest of the state or of the lessees. Concededly, a landlord may so

act as to waive a particular breach of a covenant, thereby estopping himself from asserting any right of forfeiture stemming from that breach. But it is universally recognized that "the mere fact that the landlord has failed to enforce a forfeiture on a previous breach of a condition, without more, should not be regarded as a license to commit subsequent breaches thereof." 2 Tiffany, Landlord and Tenant (1910), p. 1397.[3] As stated in 1 American Law of Property (1952), § 3.95, p. 384, "If the condition is one which permits of continuing or recurring breaches, then a waiver as to one breach does not prevent the lessor from asserting a forfeiture for later breaches." And see *Plassmyer* v. *Brenta,* 24 N.J. Super. 322, 330, 94 A. 2d 508, 512-513; *London* v. *Tebo,* 246 Mass. 360, 141 N.E. 234; *Extension Oil Co.* v. *Richfield Oil Corporation,* 52 Cal. App. 2d 105, 125 P. 2d 895; *One University Place, Inc.* v. *Egan,* 158 N.Y. Supp. 2d 823; *Ocean Grove Camp Meeting Assn.* v. *Sanders,* 68 N.J.L. 631, 54 A. 448. In short, to use the words of the New Jersey court in *East Orange* v. *Board of Water Commissioners,* 194 A. 2d 459, 466, the doctrine that a waiver of one breach does not preclude a forfeiture for future breaches "is accepted generally throughout the country." That doctrine has been one of the means employed to maintain the federal constitutional rights of lessors in conditioning the leasing and usage of their lands.

The arbitrariness of the decision below is underscored by the failure to allow the lessor's knowl-

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[3] Tiffany further states (p. 1397): "Why an exercise of the landlord's option not to enforce a forfeiture for breach of condition should have the effect of a license to commit another breach is by no means clear."

edge or intention to play any role as to *future* breaches of covenants. Petitioner has been held, solely because of certain past waivers, to have waived all future breaches. Yet, waiver, "in any normal sense," necessarily "connotes some kind of voluntary knowing relinquishment of a right." *Green* v. *United States,* 355 U.S. 184, 191. To decree that a lessor without regard to his intention or knowledge has waived the right to insist in the future upon compliance with his constitutionally protected property interests is to indulge in an arbitrary act, one that is condemned by the Due Process Clause.

3. To hold that a lessor, by reason of a waiver of certain past breaches, has forfeited all right to protect himself against future breaches by a lessee, including breaches of covenants not previously violated, is in effect to hold that the lessor has lost much if not all of his constitutionally protected right to lease or to authorize the use of his property on such legitimate conditions as he may see fit. The intolerable result—and one that is barred by the Due Process Clause—is to take away one man's property right and give it to another, without compensation or consideration. See *Osborn* v. *Nicholson,* 13 Wall. 654. The lessee is here given the lessor's valuable right to determine the nature and conditions of the land usage, such as when and under what conditions a lease may be assigned or the premises subleased. Yet that right is among the bundle of property rights protected by the Fourteenth Amendment, a right that cannot be arbitrarily and without compensation awarded to another person.

4. The Due Process Clause of the Fourteenth Amendment precludes a state legislature or a state

court from arbitrarily decreeing that a plot of land owned by A shall henceforth be vested in B. *Savings & Loan Assn.* v. *Topeka*, 87 U.S. 655, 663; *Davidson* v. *New Orleans*, 96 U.S. 97, 102; and see *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 120-121. By the same token, the Due Process Clause precludes a state court from arbitrarily decreeing that a property right which is vested in A as lessor of a plot of land shall henceforth be vested in B. *Cf. Osborn* v. *Nicholson, supra.* Therein lies the constitutional vice of the decision below. The lessor's right to determine and enforce the conditions of the lease of his land has been confiscated and given to the lessee, without compensation and without regard to the lessor's knowledge or intention.

5. Similarly, the Equal Protection Clause of the Fourteenth Amendment bans any irrational or unreasonable classification in the application of state law. *Morey* v. *Doud*, 354 U.S. 457, 465; *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527. Yet in this case the Ohio judiciary has created an invidious distinction between lessors with respect to their right to enforce covenants in their long-term leases. Those who have waived or ignored past breaches of certain covenants are treated as having waived the right to insist upon future compliance with virtually all covenants, including covenants not previously breached, while those lessors who have not previously waived a breach remain free to enforce all covenants in the future. Such a distinction with respect to future breaches finds no warrant in the law, in logic or in the practicalities of landlord-tenant relationships. See 2 Tiffany, Landlord and Tenant, *supra.* Up until now even Ohio jurisprudence has refused to recognize such

a distinction.[4] But the decision below has established a new and dangerous precedent, one that cannot be squared with the principles of the Equal Protection Clause.

This Court has held, moreover, that "Equality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." *Shelley* v. *Kraemer*, 334 U.S. 1, 10. And fundamental to the equal enjoyment of those property rights is equal access to state or federal courts to enforce the terms of reasonable and non-discriminatory covenants of leases. *Ibid.*, 22. "The equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination." *Sexton* v. *Barry*, 223 F. 2d 220, 224 (C.A. 6); and see *United States* v. *Schultz*, 150 F. Supp. 303 (S.D.N.Y.), affirmed 243 F. 2d 349 (C.A. 2).

In this case, however, the court below has barred petitioner from seeking the aid of any court to enforce in the future any covenant that may be breached, except those relative to rent and taxes. Petitioner has been "permanently enjoined from evicting or attempt-

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[4] See 33 O. Jur. 2d § 427, P. 682: "If a covenant in a lease is not a continuing one, a waiver operates to prevent any future claim of forfeiture. However, if the covenant is of a continuing nature, a waiver of one breach does not preclude a forfeiture for subsequent breaches." The case of *Hub Bldg. & Loan Co.* v. *Stone*, 28 O.L. Abs. 82 (App.), is cited in support of that summary.

Further, § 280, p. 55, of 33 O. Jur. 2d states: "As a rule, consent by the lessor to an assignment does not preclude his right to forfeit the lease because of a subsequent assignment without his consent, in violation of a provision in the lease against assignment without the consent of the lessor."

ing to evict the lessees, or persons holding under said lessees," no matter how egregious the future breach of covenant may be. Even the covenant in the lease, giving the lessor the right to regain possession upon the termination of the leasehold estate, has been found to have been "waived" by petitioner and to be unenforceable.

No other class of lessors is subject to such a closing of all judicial relief for future breaches of leasehold covenants. Such discriminatory action by the Ohio court must be viewed as a denial of equal protection; and the complete arbitrariness of that action must be viewed as a denial of due process of law.

CONCLUSION

This case represents something far more significant than a parochial application of state law relating to landlord-tenant relationships. The decision below cuts deeply and arbitrarily into the constitutionally protected rights of all lessors in the nation. Unless this Court intervenes, the States will consider themselves constitutionally free to strike down those rights whenever the lessor has for one reason or another ignored or tolerated a past breach of covenant.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS SEVENTH APPELLATE DISTRICT

No. 268

MARGARET DISS DIX, *et al*, *Plaintiff-Appellees*

v.

THE LAKE BRADY SPIRITUALIST CAMP ASSOCIATION, *et al*, *Defendant-Appellants*

Journal Entry

This cause came on for trial de novo upon the appeal on questions of law and fact, assignments of error bill of exceptions, transcript, amended pleadings, and the evidence, and upon the arguments of counsel and the briefs, the issues were submitted to the Court and upon subsequent motion of Appellees to dismiss.

IT IS ORDERED that the subsequent motion of appellees to dismiss this appeal be and is hereby overruled.

Upon consideration whereof, the Court finds upon the issues joined in favor of the Plaintiffs and the individual Defendants and against the Defendant-Appellant, The Lake Brady Spiritualist Camp Association, and that the said Defendant-Appellant has by its course of conduct during the continuance of the leases in question waived all of the covenants of said leases except the covenant to pay rent and the agreement to pay taxes and has so treated this covenant that it has waived all rights under it except the right to collect past due installments of rent and future rentals as they accrue as provided in said leases.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant, The Lake Brady Spiritualist Camp Association, be and it is hereby permanently enjoined from attempting to cancel the leases of the Plaintiffs and individ-

ual Defendants herein who are in possession of the sublots and parcels described in Plaintiffs' petition through or under the written leases issued by the Defendant, The Lake Brady Spiritualist Camp Association. The said Lake Brady Spiritualist Camp Association is permanently enjointed from evicting or attempting to evict the lessees, or persons holding under said lessees. The Court further finds that said leases are valid and in full force and effect and enjoins any interference by the Defendant, The Lake Brady Spiritualist Camp Association, with the peaceable enjoyment of the individual Plaintiffs and Defendants under their leases except the right to collect rent as the same may be due in the past, present and future, and the agreement by said lessees to pay taxes to the Treasurer of Portage County, Ohio, as the same may be assessed by the Portage County Auditor.

It is FURTHER ORDERED that the Trustee and Escrow Agent named by Journal Entry of the Common Pleas Court of Portage County, Ohio, be and is hereby directed and authorized to pay over the money to the Appellant, The Lake Brady Spiritualist Camp Association, received and held by him as lease rentals for the years 1961, 1962 and 1963.

It is FURTHER ORDERED that the costs of this appeal be assessed against the Defendant-Appellant, The Lake Brady Spiritualist Camp Association, and that a special mandate issue to the Common Pleas Court of Portage County, Ohio, for execution upon this judgment and costs.

Exceptions allowed to Appellant.

APPENDIX B

IN THE COURT OF APPEALS SEVENTH APPELLATE DISTRICT

No. 268

MARGARET DISS DIX, *et al*, *Plaintiff-Appellees*

v.

THE LAKE BRADY SPIRITUALIST CAMP ASSOCIATION, *et al*, *Defendant-Appellants*

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

Upon the application of the Appellant requiring this Court to state in writing the conclusions of fact found separately from the conclusions of law, the Court, therefore, finds as to its conclusions of fact as follows:

1. It appears from the record that the lessor in the leases, the Appellant herein, knew that the lessees in various instances had sublet the premises but they continued to accept the rent and made no objection to permitting the lessees to continue to occupy the premises.

2. Likewise, the Appellant made no objection to the assignment or transfer by the lessee of the leases and permitted and continued to permit the transferee or assignee to occupy the premises even though the leases provided that they should not be transferred without written consent of the Board of Directors; however, no specific penalty was provided for the violation of the foregoing provision.

3. The lessor permitted the lessee in many instances to mortgage or hypothecate to various banks in Portage County the buildings and homes located on the premises in question *without objection* and the lessees have accordingly mortgaged and re-mortgaged, financed and re-financed, over the years with full knowledge upon the part of Appellant that the same was being done.

4. In addition, Appellant waived the provision over the years that the lessee must maintain membership in the Association as we find that many of the parties, both Appellees and Defendants in the Court below, are not members but are lessees. This was further confirmed by the issuance in many cases of new leases in place of or in substitution of a former lease approved and issued by the Appellant through its then duly acting officers.

5. The Appellant further waived the right to inspection, sanitary conditions, and appearances of the houses on the leased premises.

6. At no time was any declaration made by the Association to the lessee until the letters mailed by Mr. Weingarten from his office in Baltimore, Maryland in March 1959. This was not the principal place of business of the corporation which was at Brady Lake, Ohio, and thus, the notification by him in those letters was unreasonable and constituted an ultra vires act on the part of the corporation.

7. Prior to the filing of the original petition in the Common Pleas Court of Portage County, Ohio, the Appellant had filed two eviction cases against two of the lessees, who are Defendants herein, in the Ravenna Municipal Court.

CONCLUSIONS OF LAW

Coming now to the conclusions of law found separately from the facts, the Court finds:

1. That the Appellant, Lake Brady Spiritualist Camp Association, has by its course of conduct during the continuance of the leases and over many years waived all of the covenants of the leases except the covenant to pay rent and to pay taxes.

2. Equity abhors a forfeiture and, of course, the Appellant has waived its right of forfeiture by its course of con-

duct in permitting the leases to be assigned, transferred, and the premises to be sublet and mortgaged.

3. Appellant, having waived by its course of conduct, the Court will not enforce the forfeiture provisions of the leases nor the restrictions or restraints against assignments, alienations or hypothecation.

4. A breach of a condition in a lease renders the lease voidable *only* but not void and the lessor must declare a forfeiture by some positive act giving the lessee the opportunity to correct or adjust the condition complained of.

5. The Appellant made no legal declaration of a forfeiture.

6. The Court finds that the Appellees had no adequate remedy at law and this Court has jurisdiction of the issues.

7. Based on the foregoing, the Court finds the leases are valid and in full force and effect and the Appellees and the individual Defendants are entitled to peaceable enjoyment of their respective premises under the leases except to the provision for payment of rent and payment of taxes.

8. There having been a waiver by the course of conduct of the Appellant, and the Court finding that it has jurisdiction and that the penalty and forfeiture clauses of the leases cannot be enforced, the Appellees are entitled to be awarded a permanent injunction against the Appellant from evicting the lessees or persons holding under the lessees.

.....

Judge, and

.....

Judge of the Ninth District sitting by Assignment in the Seventh District

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Petitioner,

vs.

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Respondents.

BRIEF OF RESPONDENTS
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BRIEF OF RESPONDENTS
Opposing Petition for Writ of Certiorari.

Petitioner is in complete error in stating "no opinions were rendered in the Court below" because the Common Pleas Court of Portage County, Ohio, rendered in writing an Opinion consisting of sixteen pages, too lengthy to be reprinted here.

COUNTER STATEMENT OF QUESTION PRESENTED.

In the courts below the question was one of validation of the 99-year leases which the petitioner maintained all through this lengthy litigation in the Ohio courts were void and of no force and effect. The suit was brought to protect the rights of the lessees and not to deprive lessor of any rights other than those it had already abandoned by its own conduct.

The question is why can't the State Courts protect the lessees when the evidence clearly showed that the covenants quoted on pp. 3 and 4 were not violated? Were not

the courts rendering equal protection which the Fourteenth Amendment specifically directs be done?

Can the petitioner now invoke the Fourteenth Amendment, having previously run the gamut of all the Courts in Ohio when it has:

1. Failed to raise the constitutional question now posed until the Application for Rehearing filed in the Court of Appeals;

2. Failed to prove violation of the lease covenants in the Trial Court;

3. Failed to present new evidence in the Court of Appeals on a Trial De Novo;

4. Failed to prove any declaration of or any forfeiture of the leases;

5. Instead the evidence showed it waived the conditions relied upon by its own course of conduct over forty (40) years.

The truth is that the petitioner had ample opportunity in this litigation, extending over five years, to prove the violation of the covenants of the leases on which were based its threats to cancel these leases by registered letters from the office of counsel Weingarten in Baltimore.

They failed to do so although they had two opportunities—first, in the trial court and, second, in the Trial De Novo in the Court of Appeals. It is notable that they elected *not* to introduce any additional or new evidence on their appeal from the Common Pleas Court and yet the appeal was on both law and fact.

ARGUMENT.

REASONS FOR DENIAL OF THE WRIT.

I. Petitioner Has Failed to Show That He Seasonably Raised the Federal Question in the State Courts.

A. Ohio requires that the constitutional question be presented and urged in the lower courts.

Petitioner does not mention in its brief that the first time the constitutional questions referred to in the Certificate of Judge Brown were raised in the Application for Rehearing filed in the Court of Appeals.

As stated by the Supreme Court of Ohio in *State, ex rel. King v. Shannon,* 170 Ohio St. 393, 165 N. E. 2d 642 (1960) (App. dis. 364 U. S. 337, reh. der. 364 U. S. 925):

> "It is an established rule of long standing in this state that a constitutional question, either in a civil or criminal action, can not be raised in the Supreme Court unless it was presented and urged in the courts below. Hoffman v. Staley, 92 Ohio St., 505, 112 N. E. 1084; Cuthbertson v. State, 106 Ohio St., 658, 140 N. E., 941; Zimmerman v. Morris Plan Bank of Cleveland, 113 Ohio St., 703, 150 N. E., 920; and Village of Clarington v. Althar, 122 Ohio St., 608, 174 N. E. 251."

B. In order to invoke this Court's jurisdiction under 28 U. S. C. par. 1257(3), the federal question must be seasonably raised in the state courts.

This Court has recently stated in *Edelman v. California,* 344 U. S. 357, 358 (1953):

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

Petitioner failed to present the constitutional questions in the lower courts, as required by Ohio law, hence

has failed to provide this Court with the basis for the exercise of its jurisdiction, under 28 U. S. C., par. 1257 (3). On that ground alone the petition for the writ of certiorari should be dismissed.

II. Petitioner Was Not Denied Any of Its Federal Rights.

The Petitioner refuses to narrow the principles involved to the facts in this case. No constitutional questions were presented in the trial of the case, nor were they brought up in the initial stages of the Court of Appeals action. They are brought up now to present a case that was not presented by the facts in the original action.

The events at issue in this case extended over a period of forty years. During that period the officers who were then in control of the Corporation permitted and acquiesced in certain practices as to the use of the leased premises.

In or about the year 1957, the management of the Association was taken over by the two individuals who started the present litigation. In an attempt to gain control of the leased properties, this new management arbitrarily and summarily declared that certain acts which had been permitted and acquiesced in by the old management were such violations of the leases as to justify the eviction of the lessees from homes that they had occupied over a period of years.

The holding of the Court was simply that a lessor, who over a long period of time has permitted defendant lessees to ignore various provisions of the leases and by so doing acquire certain vested rights and privileges, cannot at a later date, arbitrarily, without clear proof of such violations and without any formal declaration of forfeiture, maintain actions to evict them from their homes.

Both the trial and the appellate courts held the leases

to be valid. This decision and injunction are to prevent further evictions originating in or based upon the facts considered in this case, as to the defendant lessees and all other lessees in the same class. The decision and order of the Court provide no interference with the operation of the leases except in those instances that have become res adjudicata by this action.

CONCLUSION.

The points numbered and raised by the Petitioner under the heading "Reasons for Granting the Writ" are, except for No. 1, repetitious and not applicable to the present case because they ascribe to the decision of the Court of Appeals an interpretation which does not exist and, apparently, are stated for the sole purpose of supporting their Petition in this Court. For example, there is no holding by the lower court that the lessor cannot regain possession of the premises at the end of the terms, and the true meaning of that court's finding is based solely on the facts presented which occurred over the forty-year period.

Thus, the conclusions are as follows:

1. That the application of the Fourteenth Amendment is as much for the protection of the lessee as the lessor.

2. Petitioner did not seasonably raise any federal question until it applied for rehearing in the Court of Appeals.

3. No federal rights have been denied to the petitioner.

4. The petitioner has enjoyed the full use of all of the State Courts of Ohio with adequate opportunity to present its various appeals, of which it has availed itself, and it received the same protection of the laws of Ohio as is afforded all other citizens.

5. The petition here filed does not present any public, constitutional, or important questions but, on the contrary, clearly shows the situation to be simply a private controversy between Ohio citizens which has already been properly, legally and equitably decided by the Courts of Ohio. (See App. A & B.)

For the reasons above stated, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Order of the Supreme Court of Ohio Dismissing Appeal as of Right.

(Entered June 3, 1964.)

No. 38646.

THE STATE OF OHIO, CITY OF COLUMBUS.

MARGARET D. DIX, *et al.*,

Plaintiffs-Appellees,

vs.

LAKE BRADY SPIRITUALIST CAMP ASSN., *et al.*,

Defendants-Appellants.

This cause, here on appeal as of right from the Court of Appeals for Portage County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellees recover from the appellants their costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Portage County for entry.

(Certificate of Clerk omitted.)

APPENDIX B.

Order of the Supreme Court of the State of Ohio Overruling Motion to Certify Record.

(Entered June 3, 1964.)

(Caption omitted.)

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR PORTAGE COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

Motion Fee, $20.00, paid by Mock & Mock.

(Certificate of Clerk omitted.)

IN THE

Supreme Court of the United States

October Term, 1964

No. 723

LAKE ERIE STEELHEAD CAMP ASSOCIATION,
Petitioner,

v.

MARGARET DEE DEE, *et al*, *Respondents.*

On Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Appellate District of Ohio

PETITIONER'S REPLY MEMORANDUM

CARL E. WEINGARTEN
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Counsel for Petitioner

February 4, 1965.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 723

LAKE BRADY SPIRITUALIST CAMP ASSOCIATION,
Petitioner,

v.

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On Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Appellate District of Ohio

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PETITIONER'S REPLY MEMORANDUM

In response to the Brief of Respondents opposing the Petition for Writ of Certiorari, petitioner desires to make the following points plain:

1. Raising the Federal Questions

Respondents' contention (Opp., p. 3) that the federal questions were not seasonably raised in the courts below is belied by the record. The certification by Judge Brown, a certification not disputed by respondents, conclusively demonstrates that the federal constitutional issues were in fact raised by petitioner and were considered and denied by the Court of Appeals. That certification dissipates respondents' suggestion that raising these questions for the first time in the application for rehearing in the Court of Appeals came too late.[1] The Court of Appeals—the highest state court dealing with the issues—denied the federal claims on their merits rather than on any supposed procedural deficiency. And it denied these claims in the course of denying the application for rehearing, which was petitioner's earliest opportunity to press the federal issues.[2]

Further confirmation of the timely existence of the federal issues is to be found in the action of the Supreme Court of Ohio in dismissing the appeal from the

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[1] Respondents erroneously state (Opp., p. 3) that petitioner failed to mention in the Petition for Writ of Certiorari that these questions were raised for the first time in the application for rehearing in the Court of Appeals. The Petition expressly pointed out this fact (Pet., p. 7) and explained the reason therefor.

[2] As explained in the Petition (p. 7), under Ohio law the proceedings in this equity matter before the Court of Appeals were *de novo* rather than appellate in nature. Ohio Constitution, Art. 4, § 6; Ohio Rev. Code, § 2505.21; *Connelly* v. *Balkwell*, 160 Ohio St. 430; *Cupps* v. *City of Toledo*, 172 Ohio St. 536. Not until the Court of Appeals judgment was rendered did it become apparent that it went beyond the issues raised and the relief requested by respondents in their pleadings. Then and then only could the federal issues be raised.

Court of Appeals "for the reason that no *substantial* constitutional question exists herein" [Emphasis added]. The Supreme Court thus dismissed the appeal not because the federal issues had been first raised in the rehearing application below but because the constitutional questions were thought to lack sufficient substance to warrant review.

Hence, the federal claims having been actually considered and decided by the highest state court dealing with the merits of the case, this Court "need not inquire how and when the [federal] question . . . was raised." *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U.S. 182, 185-186. Here, as in *Raley* v. *Ohio,* 360 U.S. 423, 436, "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." In this context, any inquiry by this Court into how or when the question was raised in the state courts becomes irrelevant in determining the appropriateness of exercising this Court's certiorari jurisdiction. An irrebutable presumption as to the proper raising of the federal issues has been created by the action of the Court of Appeals —as attested to by the certification of Judge Brown— in considering and denying the merits of the federal questions even though they were first raised in the rehearing application. And the action of the Supreme Court of Ohio in treating the federal issues in terms of their substance rather than their procedural timeliness only confirms that presumption.

2. The Substantiality of the Federal Issues

Respondents do not seriously challenge the substantiality of the federal constitutional questions raised by the judgment below. The constitutional defect of the

lower court decree appears plain: a lessor has been deprived of his constitutional property rights simply because of a finding that he ignored certain past breaches of covenants by certain lessees. Because of those past waivers, petitioner as lessor has been held to have forfeited all right to enforce the lease covenants (other than as to rent and taxes) in the future, even as to

> (1) those lessees who committed no breaches in the past that might have been considered waived, and
>
> (2) those lessees whose past breaches were not of a continuing nature and whose future breaches might be of an entirely different nature than those of the past.

The completely indiscriminate nature of the judgment below, voiding nearly all of the covenants in a large number of 99-year leases, raises in unavoidable form the due process and equal protection questions set forth in the Petition. Indeed, those questions are presented in a most aggravated setting—the lessor's property rights having been declared forfeited *on a retroactive basis* due to past waivers of breaches. At the time of those breaches, the lessor had no notice and no reason to believe that a waiver would result in a total voiding of the right to enforce *virtually all* the covenants in *all* the leases in the future.

The failure of the Ohio courts to respect the legitimate concerns and the constitutional rights of this lessor, particularly in the absence of any countervailing state concern, makes appropriate plenary review by this Court.

CONCLUSION

For these reasons, supplementing those set forth in the Petition, a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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February 4, 1965.